BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-93-E - ORDER NO. 2001-888

AUGUST 29, 2001

IN RE:	Proceeding to Examine the Appropriate Treatment of the Gain from the Sale of Carolina Power & Light Company's Investment in BellSouth's PCS Digital Cellular Network.	)))))	ORDER DENYING PETITION FOR RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Reconsideration of Order No. 2001-662, filed by the Consumer Advocate for the State of South Carolina (the Consumer Advocate). Carolina Power & Light Company (CP&L or the Company) filed a Return to the Petition. For the reasons stated herein, the Consumer Advocate's Petition is denied.

Order No. 2001-662 granted CP&L's Motion for Summary Judgment. The Consumer Advocate states its belief that this holding was in error in several particulars. First, the Consumer Advocate alleges that this Commission does not have the authority to utilize summary judgment to dispose of contested proceedings, since summary judgments are governed by Rule 56 of the South Carolina Rules of Civil Procedure in civil court actions, and this Commission has no similar rule adopting summary judgment as a part of Commission procedure. This position is without merit.

S.C. Code Ann. Section 58-27-1910 (1976) provides that the Commission may prescribe rules governing pleadings, practice and procedure before it not inconsistent with the provisions of this chapter or any other provisions of law. The Rules of Practice

and Procedure, adopted by this Commission pursuant to Section 58-27-1910 to govern proceedings before this Commission are set forth as Regulations 103-800 through 103-885. Regulation 103-800 states as follows:

> The adoption of these rules shall in no way preclude the Public Service Commission from altering, amending or revoking them in whole or in part, or from making additions thereto, pursuant to provisions of law, upon petition of a proper party or upon its own Motion.

The Commission's Rules of Practice and Procedure set forth specific details for the handling of complaints, petitions, motions and protests. (See generally Rules 103-835 through 103-840). Rule 103-840 specifically addresses motions. It permits the filing of motions in any matter properly before the Commission. This rule does not attempt to identify all of the various motions that may be made to the Commission, but simply authorizes the filing of motions and identifies those specific motions that must be reduced to writing and filed ten (10) days before a hearing. Common motions not specifically mentioned in Rule 103-840 are motions to dismiss, motions to compel, motions for more definite statement, motions for extensions of time, and motions to review a utility's earnings. The Consumer Advocate himself has filed motions to dismiss and motions to review a utility's earnings, neither of which is expressly mentioned by the Commission's regulations. See Commission Docket Nos. 96-318-C and 1999-178-C.

It should be noted that the Commission holds "proceedings." A "proceeding" is defined as "the general process of the commission's determination of the relevant facts and the applicable law, the consideration thereof and the action thereupon in regard to a particular subject matter within the Commission's jurisdiction, initiated by the filing of an appropriate pleading or issuance of a Commission order or rule to show cause or by

the receipt of oral or written communication by the staff." Regulation 103-804 (E). Since the Commission must, by definition, hold proceedings, the Commission must have the flexibility to dispose of them in a summary manner.

The Legislature seems to have agreed with this proposition with the passage in 1932 of S.C. Code Ann. Section 58-27-1990 (1976), which states as follows: "The Commission may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights." Although stated in terms of a ruling on summary judgment, our holding in Order No. 2001-662 also meets the standard of this statute.

> Clearly, the affidavits of the Company demonstrate that its investment in BellSouth PCS through its Caronet subsidiary was discretionary investment unrelated to providing electric service, and that the gain or loss resulting from the investment is the benefit or burden of CP&L's shareholders, not its regulated electric customers. The investment was never included in the Company's rate base nor were the ongoing earnings or losses included in utility operating income. Order No. 2001-662 at 7.

Thus, even if it should be held that no "summary judgment" procedure is allowable for the Commission, a notion which we firmly deny, it is clear that our holding in Order No. 2001-662 met the standard explicated in Section 58-27-1990, and the specific import of our holding in that Order was and is now that a hearing is not necessary in the public interest, nor is a hearing necessary for the protection of substantial rights, because of the fact that no CP&L customer rights were affected by the BellSouth PCS investment. The Company firmly established through affidavits that only the shareholders of the Company were affected by this investment. In truth, we believe that the matter was ripe for dismissal under either a summary judgment procedure, or, in the alternative, under the

provisions of S.C. Code Ann. Section 58-27-1990 (1976). Thus, no error resulted from our action in Order No. 2001-662.

Further, we would note that the Consumer Advocate failed to raise the argument that the Commission does not have the power to grant summary judgment when the Motion for Summary Judgment was filed. The Consumer Advocate filed a document called "Return to CP&L's Motion for Summary Judgment and Reply to CP&L's Response," and discussed in detail the standard for summary judgment. However, the Consumer Advocate never raised any issue about summary judgment not being an appropriate procedure. "In reviewing a final decision of an administrative agency, the Circuit Court has a limited scope of review, and cannot ordinarily consider issues that were not raised to and ruled upon by the administrative agency." Kiawah Resort Associates v. South Carolina Tax Commission, 318 S.C. 502, 458 S.E. 2d 542 (1995). Similarly, when an issue is not raised until a petition for reconsideration, we should not consider issues not raised and ruled upon in the underlying case. In essence, the Consumer Advocate waived his right to state at this point that the Commission had no authority to grant a summary judgment motion. Accordingly, this allegation of the Consumer Advocate's Petition is without merit.

Second, the Consumer Advocate notes that "even if such a procedure was available," we erroneously granted CP&L's Motion for Summary Judgment, based on the proposition that "there are material issues of fact that must be decided in this case." Petition of Consumer Advocate at 2. The Consumer Advocate states that our finding in our original Order that the investment in BellSouth PCS through the Caronet subsidiary

was a discretionary investment unrelated to electric service is not supported by the filings in this case, and, in fact, is a material issue of fact that should have been addressed by this Commission after a hearing. Unfortunately for the Consumer Advocate, the affidavits filed by CP&L do indeed establish this assertion as a fact, and no hearing is needed for further inquiry. The affidavit of James A. Bass, Jr., Program Leader-Accounting Principles for Carolina Power & Light and Bruce P. Barkley, Manager-Regulatory Accounting for Progress Energy Service Company tell the tale, and are extensively quoted in Order No. 2001-662. The original investment has never been included in rate base in any jurisdiction. CP&L's equity in the earnings of its subsidiary, which include CP&L's share of the BellSouth PCS gains and losses, is and was recorded in FERC account 418.1, "equity in earnings of subsidiary companies." This account is not a "utility operating income" account, but is an "other income" account. CP&L noted that neither the losses, nor the gains from this investment were ever allocated to or charged against CP&L's operating income. Clearly, the material question in this matter is whether or not the investment in question ever involved any electric ratepayer funds or electric ratepayer accounts. The answer is negative, as shown by the affidavits of the Company. All of the other issues asserted by the Consumer Advocate are simply not material issues of fact in this case, and are irrelevant to this basic premise.

The Consumer Advocate's discussion of the Code of Conduct and Regulatory Conditions is misplaced. CP&L showed that CP&L did not have voting control of any BellSouth PCS securities. Thus, CP&L's Code of Conduct and Regulatory Conditions have no relevance to this matter. Even if CP&L had had a 10% voting control of

BellSouth PCS's securities, which it did not, and these documents applied to the transaction under consideration, the Commission would have simply had to determine whether any particular ratemaking adjustments should have been made as a result. This proposition leads us back to an examination of the original question as to whether the investment had any electric ratemaking implications for the Company's ratepayers. Again, we already decided that question in the negative, based on the affidavits of the parties. Thus, the consideration of the Code of Conduct and Regulatory Conditions is really irrelevant and immaterial to the main question before the Commission, i.e., whether the investment was made with electric ratepayer funds.

Likewise irrelevant and immaterial is the question of CP&L's involvement in a consortium of companies that acquired a digital spectrum license from the FCC. This has nothing to do with the question of whether the ratepayers of the Company should have benefited from the sale of the Company's interest in BellSouth PCS securities. In addition, the Consumer Advocate's entire discussion of the tax treatment of the transaction is misplaced, and again, is irrelevant and immaterial.

In the Consumer Advocate's early pleadings, he seems to assert that the issue presented to the Commission in this proceeding is whether CP&L's payment to Caronet of an amount equal to the tax benefit CP&L realized as a result of a portion of Caronet's losses from its investment in BellSouth PCS being used by CP&L in calculating its income tax obligation for tax years 1995 to 1998 constitutes a subsidization of Caronet by CP&L's retail electric customers, and whether, therefore, a portion of the gain CP&L realized when it sold its investment in BellSouth PCS should be allocated to CP&L's

South Carolina electric customers. The answer, again, is in the negative, since CP&L's investment via Caronet in BellSouth's PCS network was, at all times, treated as a non-utility investment, with the risk of loss always on CP&L's shareholders.

Further, the Consumer Advocate's language in his Petition for Reconsideration misinterprets our intent in Order No. 2001-662. In this instance, CP&L had a stand-alone regulated utility federal tax liability for which CP&L's electric customers are directly responsible. Due to the losses experienced by BellSouth PCS, CP&L was able to reduce its overall federal tax obligation. The tax savings actually belonged to Caronet/ BellSouth. CP&L credited the loss to Caronet and reflected this in its financial reports to the Commission as a utility tax obligation. No subsidy occurred. CP&L did not pay any expense incurred by Caronet or BellSouth PCS, rather it simply reimbursed them for a tax advantage that CP&L enjoyed due to its non-utility investment in BellSouth PCS. Our statement, to wit: "Also, we conclude that there are no tax benefits to be gained by CP&L's regulated utility ratepayers under the scenario in this case. CP&L used its stand-alone tax liability rather than the consolidated tax liability. This alleviates the 'vested financial interest' of ratepayers in the gain from CP&L's sale of its interest in BellSouth PCS, under the scenario outlined by CP&L's affidavits in this case," is simply another way of saying that because the use of stand-alone accounting was appropriate, and CP&L's electric customers had no "vested financial interest" in the BellSouth PCS gain.

The difficulty with the Consumer Advocate's position is that he fails to recognize that those who benefit from a gain must also suffer any associated losses. CP&L's electric customers never had a "vested financial interest" in any of BellSouth PCS's

losses on the investment, and therefore had no "vested financial interest" in any gains, since the losses and the gains were both the result of an investment of CP&L shareholder monies, not ratepayer monies.

In short, the Consumer Advocate's Petition for Reconsideration of Order No. 2001-662 has no merit, and it is therefore denied and dismissed.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)